ORAL ARGUMENT SET FOR DECEMBER 5, 2018

CASE NO. 18-1109

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLLECTIVE CONCRETE, INC. and REMCO CONCRETE LLC,
Petitioners/Cross-Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

NEW JERSEY BUILDING LABORERS DISTRICT COUNCIL,
Intervenor

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Collective Concrete, Inc., a New Jersey Corporation engaged in the business of commercial concrete and masonry, states that it is a non-governmental corporate party, and no parent corporation or publicly-held corporation owns 10% or more of its stock. Petitioner Remco Concrete, LLC, a New Jersey Limited Liability Company engaged in the business of commercial concrete and masonry, states that it is a non-governmental corporate party, and no parent corporation or publicly-held corporation owns 10% or more of its stock.

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

1. Collective Concrete, Inc. and Remco Concrete, LLC are the Petitioners.

2. The National Labor Relations Board ("Board" or "NLRB") is the Respondent and Cross-Applicant for Enforcement.

3. New Jersey Building Laborers District Counsel was the Charging Party in the proceeding before the Board.

4. There are currently no amicus curiae.

B. Rulings Under Review

Petitioners seek review of the Board's Decision and Order captioned as RDM Concrete & Masonry, LLC, Collective Concrete, Inc., and Remco Concrete, LLC, Alter Egos and a Single Employer and New Jersey Building Laborers District Council., Case No. 22-CA-181515, 366 NLRB No. 34 (2018) (Unpub. Mar. 13, 2018).

C. Related Cases

The instant case has not previously been before this Court or any other court involving the same parties. As of the date of this filing, Petitioners are not aware of any other case pending before this Court involving substantially the same or similar issues as the instant case.

STATEMENT REGARDING ORAL ARGUMENT

The Board's Region improperly held that Remco Concrete, LLC is an alter ego of Collective Concrete, Inc. ("Collective") and RDM Concrete & Masonry, LLC ("RDM") for purposes of recognizing and bargaining collectively with the New Jersey Building Laborers District Council, as well as applying the terms and conditions of Collective and RDM's collective bargaining agreements, including wage rates and benefit fund contributions. In so holding, the Board failed to consider whether the equities supported imposing alter ego status on Remco. While District Courts within this Circuit have required consideration of the equities even in the presence of sufficient indicia of an alter ego relationship, the D.C. Circuit has not yet adopted or rejected such a rule. Thus, oral argument will assist the Court in addressing this matter of first impression.

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GLOSSARY

Act or NLRA:	National Labor Relations Act
ALJ:	Administrative Law Judge
ALJD:	Administrative Law Judge's Decision
Board:	National Labor Relations Board
Board Br.:	Board's Brief
CBA:	Collective Bargaining Agreement
JA:	Joint Deferred Appendix
D&O:	The Board's Decision and Order
NLRB or Board:	National Labor Relations Board
Petitioners:	Remco Concrete, LLC and Collective Concrete, Inc.
RDM:	RDM Concrete & Masonry, LLC
Remco:	Remco Concrete, LLC
Union:	New Jersey Building Laborers District Council

JURISDICTION

This is a petition for review from a decision of the Board, and a cross-application for enforcement by the Board. This Court has jurisdiction pursuant to Section 10 of the National Labor Relations Act (the "NLRA" or "Act"), 29 U.S.C. § 160. The Board's Order is final with respect to all parties.

PRELIMINARY STATEMENT

Remco Concrete, LLC ("Remco") is not and has never been a signatory to a CBA or any other agreement with any union, and performs work exclusively in the non-union market. Nevertheless, the Board has improperly ruled that Remco must abide by the terms and conditions of Collective Concrete, Inc.'s ("Collective") and RDM Concrete & Masonry LLC's ("RDM") CBA, and also must recognize and bargain with the New Jersey Building Laborers District Council (the "Union"). In so holding, the Board committed errors of both fact and law. The Board's erroneous decision will have a devastating economic impact on Remco, a legitimate operation that elected to perform concrete and masonry work in the non-union sector.

Collective and Remco constitute a lawfully double-breasted operation, wherein the two entities are separate and distinct, with Remco performing non-union work and Collective performing union work. Remco and RDM, on the other

hand, do not even rise to the level of a double-breasted operation. Remco and RDM are simply separate and distinct companies with different owners.

The Board improperly affirmed the ALJ's finding that Remco is an alter ego of Collective and RDM such that Remco is bound by the terms and conditions of Collective and RDM's collective bargaining agreement with the Union. There is not substantial evidence to support a conclusion that Remco is a sham company that is really a disguised continuation of either Collective or RDM. At best, the facts relied upon by the ALJ are indicative the fact that Collective and Remco have the same owner and operated as a lawful dual shop enterprise, and that a familial relationship exists between the owners of Remco and RDM. These circumstances are insufficient as a matter of law to convert Remco, a legitimate non-union company, into a union company that must abide by the terms and conditions of a CBA to which it never agreed.

Furthermore, the Board committed an error of law by failing to consider applicable precedent in deciding that the alter ego doctrine should apply to Remco under the particular circumstances of this case. District courts in this Circuit have held, based on rulings of other Circuit Courts, that alter ego doctrine is not to be mechanistically applied in all cases, even if indicia of an alter ego relationship are present. Instead, the alter ego doctrine, which is equitable in nature, should be applied only where necessary to prevent inequity. Thus, even despite the presence

of sufficient alter ego factors, the alter ego doctrine should not be applied to bind a non-union company to union obligations absent a showing that some inequity would otherwise result. The Board failed to engage in any such analysis before conclusorily affirming the ALJ's ruling that Remco is an alter ego of Collective and RDM. Because the Board's decision was inconsistent with precedent, it should be reversed, or, at the very least, remanded.

ISSUES PRESENTED

1. Whether Board erred in finding that Remco is an alter ego of Collective and/or RDM.

2. Whether the Board erred by indiscriminately applying the alter ego doctrine without engaging in any analysis as to the equities.

RELEVANT STATUTES AND REGULATIONS

Section 8 of the NLRA, 29 U.S.C. § 158:

(a) Unfair labor practices by the employer

It shall be an unfair labor practice for an employer – . . .

(1) to restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10 of the NLRA, 29 U.S.C. § 160:

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE AND FACTS

I. Ryan Ciullo Forms Collective in 1998

Ryan Ciullo ("Ryan") has been involved in the masonry construction business for his entire working life. (JA156). Beginning at a young age, Ryan would spend summers working with his father doing masonry work. (*Id.*). About four or five years after working for his father Mark Ciullo's ("Mark") masonry construction business after graduating high school, Ryan decided to form his own company. In 1998, when he was just 22 years old, Ryan formed Collective Concrete Corporation, a commercial concrete and masonry business, because he wished to "make [his] own decisions and make [his] own money." (JA157).

Since its inception, Ryan has been the sole owner of Collective. Around the time Ryan formed Collective, his father's company, D&M, which performed concrete and masonry in the residential housing sector, was floundering due to the competitive nature of the housing market. (JA158). As such, D&M faded away, and Ryan hired his father Mark as Collective's office administrator. (JA19). In that role, Mark was responsible for billing, banking, payroll, and accounts payable and receivable. (*Id.*). Additionally, Mark visited jobsites in connection with making job bids and meeting with superintendents. (JA16-19, 70-72). While Mark's role was mostly in the office, Ryan worked primarily in the field supervising jobs. (JA70-74). Mark never loaned money to his son to form Collective. (JA175). Mark was

also not listed on the establishment papers or incorporation pages of Collective. (JA117). Mark was simply a paid W-2 employee of Collective. (JA175).

In addition to hiring his father, Ryan also hired his sister, Desiree Ciullo ("Desiree"), as office manager of Collective, where she performed secretarial and clerical tasks. (JA10). In accordance with their roles at Collective, Ryan, Mark, and Desiree were all authorized to engage in the banking transactions with Sovereign Bank of Collective. (JA280).

Sometime in 2001, while Mark was at one of Collective's jobsites speaking with a superintendent, he was approached by agents of the Union about Collective becoming a signatory to their contracts. (JA75-76). Mark, after speaking with Ryan, agreed to sign a short form agreement with the Union, which was thereafter sent to the office and signed by Ryan on April 3, 2001. (JA167). Subsequently, Collective agreed to three additional and successive short form agreements with the Union. (JA21, 75-79, 120-127, 167).

Shortly after Collective signed the first short form agreement, the Union filed grievances alleging that Collective had violated the contract. (JA79). On August 28, 2002, Mark appeared on behalf of Collective at an arbitration hearing on those grievances. On June 23, 2004, the arbitrator issued his decision finding a violation and directing Collective to submit to an audit. A second arbitration decision was issued on July 28, 2006, directing Collective to pay the Union

$10,384.72 for its violations. On September 20, 2006, the Union filed a petition to confirm the 2006 arbitration award. On January 8, 2007, the United States District Court for the District of New Jersey granted the Union's petition. (JA213, 398, 79-84).

Beginning around 2007, the financial health of Collective began deteriorating. (JA20, 52, 104, 106, 169, 171). By 2013, Collective's debt accumulated to $163,000. (JA127). As explained by Ryan, Collective began as a non-union company, and "[t]o jump into Union work requires a lot of capital." (JA37). Accordingly, Ryan incurred massive debt in order to keep operating as a union company. (*Id.*). Moreover, Collective had trouble obtaining union jobs, which tend to be "high profile" and "very competitive." (*Id.*). For these reasons, the financial health of Collective became so bad that Collective could no longer afford to pay Mark. (JA85). As such, Mark went on to form his own company, RDM, in 2007, which is discussed in more detail below. (*Id*).

Despite Collective's grave financial difficulties, Ryan chose not to shut the company down so that he could pay off its debts and other financial obligations, such as workers' compensation benefits, IRS liens, and contributions to the Union. (JA53, 160-162). Notably, Collective paid all contributions due and owing to the Union, even when it went dormant. (JA161). Collective is not currently delinquent in any of its obligations to the Union. (JA54, 160-161).

Collective performed its last job in 2014, which involved supplying only finishers from the mason's union to Kewit Construction at the Perth Amboy bridge project. (JA36-37, 162-163). Because Kewit self-performed some of its work, Kewit provided all laborers. (JA36-37). Collective also performed some finishing work for RDM in 2014. (JA42-47, 183-188). Subsequently, Collective was unable to perform any additional work and became a dormant company which Ryan kept open so that he could pay off its debts. (JA45, 53, 106). Ryan also kept Collective open in hopes that one day he could resume performing union work if and when the marketplace and Collective's financial situation allowed for it. (JA170).

In order to generate income to pay off Collective's debts, Ryan performed various jobs. For example, Ryan worked as a foreman for RDM until RDM began encountering financial difficulties similar to Collective's and Ryan was laid off from RDM. (JA100-101, 119, 164). Ryan then did some consulting work in 2015 for another company, Green Horizons, which was owned by Mark, Ryan, and Don Yonkers. (JA38, 54).[1] Payment for Ryan's consulting work was made by checks made out to Collective and deposited in Collective's bank account in the total amount of $73,000. (JA39-41). During that same period and until mid-2016, Ryan also worked as a foreman for DY Concrete, a nonunion company owned by Don Yonkers for which he was paid a salary. (JA47-48).

[1] Green Horizons was a general contractor in the business of erecting steel buildings. (JA165).

II. Mark Ciullo Forms RDM in 2007

Having been let go from Collective when the company no longer had funds to pay him, Mark started his own concrete and masonry company, RDM, in April 2007. (JA20, 84-85, 115). RDM is owned by both Mark and his wife, Deborah Ciullo ("Deborah"). (JA86). Desiree also worked for RDM as an office manager and was authorized to sign for the RDM account at Santander Bank. (JA96). Deborah was also an authorized bank signer. (JA94-96). RDM operated out of the office leased and used by Collective, located at 460 Faraday Avenue, Suite 3, in Jackson, New Jersey. (JA87-94, 406, 416, 418, 423, 433, 498, 592). When Collective could no longer afford to pay its lease in 2013, RDM took over the lease and continued operating out of that office. (JA24, 91).

Beginning in 2013, RDM began providing financial assistance to Collective, which, as discussed above, was experiencing overwhelming financial difficulty at that time. RDM loaned money to Collective, which Ryan intended to pay back. Collective paid back the loans from RDM, in part, by transferring some of Collective's equipment to RDM, since Collective did not have any cash flow. RDM also purchased some of Collective's equipment in order to provide funds to Collective. (JA24, 115).

RDM also assisted Collective in about 2012 or 2013, when Collective's bank threatened to call in its line of credit because Collective was not performing

any work. (JA29-32, 169). Because RDM was doing work and "had assets," RDM cosigned with Collective's bank so that Collective could make a payment plan to repay the line of credit. (JA30).

Initially, RDM was a non-union company, until the Union organized its workers and obtained authorization cards signed by a majority of RDM employees. (JA135-136). Accordingly, the Union filed a representation petition with the Board on May 7, 2014. (Id.) Shortly thereafter, Mark met with three representatives of the Union, including Union Coordinator Gurvis Miner. (JA145-146). At that meeting, Mark initially expressed his reluctance to sign with the Union in light of the fate suffered by Collective after signing with the Union. (JA102-103, 148-149). Eventually, however, Mark agreed to sign with the Union on June 20, 2014. (JA105, 154-155).

Not long after RDM signed with the Union, the Union filed a grievance against RDM. The matter went to arbitration and the parties agreed to a consent arbitration award on November 17, 2015, which was confirmed by the United States District Court on April 13, 2016. (JA105, 437). RDM was required to borrow money from its line of credit in order to pay the monies owed to the Union under the arbitration award. (JA105).

After signing with the Union, RDM met the same fate as Collective. That is, RDM began experiencing substantial, crippling debt caused at least in part by

having to use union workers on jobs that were initially bid non-union. (JA45, 99, 104, 129, 132). For example, RDM owes the IRS over $600,000, and owes Santander Bank around $667,000. According to Mark, as of June 15, 2017, RDM owes approximately $1.5 million total in various debts. (JA132). As a result of its grim financial outlook, RDM was forced to lay off its employees, including Ryan. (JA85, 166). Nevertheless, Mark has not ceased RDM's operations, and has persisted in trying to obtain bids for more union work. (JA132).

III. Ryan Ciullo Forms Remco in 2015

In late 2015, while still working for DY, Ryan formed Remco as a non-union concrete and masonry company. (JA48-49). Remco is owned 99% by Ryan, and 1% by his wife, Jennifer Ciullo ("Jennifer"). (JA49). Remco operates out of an office located at 1889 Route 9 in Toms River, New Jersey. (JA50). Mark neither owns any part of, nor performs any work for, Remco. (JA172). Remco employed many RDM employees who, prior to the formation of Remco, either chose not to join the Union or were laid off by RDM. (JA55-56, 118, 172-173, 182).

Ryan testified that he formed Remco because he "couldn't support [himself] as a Union contractor," as is apparent by the financial ruin of Collective. (JA52). Ryan intended to benefit from the non-union marketplace with Remco, while continuing his union company, Collective, in hopes that the marketplace would sustain union work at some point in the future. (JA168, 170). In other words,

Remco and Collective together constitute a lawfully "double-breasted" or "dual shop" operation which allows Ryan to compete for both union and non-union work.

By letter to Ryan dated December 2, 2016, the Union requested that Remco recognize the Union as the collective bargaining representative of the laborers in its employ and that Remco apply the CBA to the laborers. (JA595). In a response dated December 12, 2016, Remco refused the Union's request. (JA596).

Ryan was quite candid about his desire to keep Remco non-union based on both Collective and RDM's difficulty succeeding in the union marketplace and their resulting financial ruin. At some point in 2017, Union agent Sammy Espinoza arrived at one of Remco's jobsites in 2017 and introduced himself to Ryan as a representative of the Union. During that meeting, Ryan openly expressed his preference to maintain Remco as a non-union operation in light of the serious misfortune both he and his father encountered attempting in good faith to operate Collective and RDM in the union marketplace. (JA138). Ryan readily acknowledged his relationship to Collective and RDM and was in no way deceptive about his desire to operate Remco as an open shop.

IV. Proceedings Below

On August 4, 2016, the Union filed a NLRB unfair labor practice charge against Collective, RDM and Remco pursuant to Section 8(b) of the NLRA.

Collective and RDM are signatories to a collective bargaining agreement ("CBA") with the Union, while Remco is not.

On February 28, 2017, the Regional Director for Region 22, acting for and on behalf of the General Counsel for the NLRB, issued a Complaint and Notice of Hearing alleging that Remco is an alter ego of Collective and RDM and was therefore required to (1) recognize and bargain with the Union and (2) apply terms and conditions of the CBA governing Collective and RDM to Remco's bargaining unit employees. The Complaint further alleged that, by failing and refusing to do either, Remco violated Section 8(a)(5) of the Act. In essence, the Complaint sought to treat Collective, RDM and Remco as one employer.

A hearing in the instant case was held before ALJ Jeffrey Gardner on May 17, June 15 and June 19, 2017 in Newark, New Jersey. The ALJ issued an Order and Decision on November 3, 2017. In his Order and Decision, the ALJ first found that Collective and RDM were alter egos (even though both Collective and RDM were already signatories to a CBA and therefore that holding was of no legal consequence). The ALJ then found that Remco is an alter ego of both Collective and RDM. It is this branch of the ALJ's decision which forms the basis for this appeal.

On or about January 5, 2018, Remco and Collective filed exceptions with the Board to the ALJ's Decision to the extent it found Remco to be an alter ego of

Collective and RDM. On March 13, 2018, the Board issued a Decision and Order affirming the ALJ's rulings, findings, conclusions, and remedy and adopting the ALJ's recommended Order as modified. This appeal followed.

SUMMARY OF THE ARGUMENT

The ALJ and the Board failed to properly apply the alter ego doctrine in determining that Remco is an alter ego of Collective and RDM for purposes of binding Remco, a non-signatory to any CBA, to Collective's and RDM's CBAs and forcing Remco to recognize and bargain with the Union. Not only was there no substantial evidence to support a finding that that Remco is an alter ego of Collective and/or RDM, but the Board failed to consider whether the imposition of alter ego status upon Remco was warranted under the circumstances as a matter of equity. Accordingly, the Board's order should be denied enforcement.

I. The Board's Adoption of the ALJ's Finding That Remco Is an Alter Ego of Collective and/or RDM Is Not Supported by Substantial Evidence

In order to determine whether an entity is an alter ego of another entity for purposes of liability under a CBA, the Board is required to consider: "'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.'" *Newspaper Guild of New York, Local No. 3 of Newspaper Guild, AFL-CIO v. N.L.R.B.*, 261 F.3d 291, 299 (2d Cir. 2001) (quoting *Goodman Piping Prods., Inc. v. N.L.R.B.*, 741

F.2d 10, 11 (2d Cir.1984)). The test for ascertaining whether one company is an alter ego of another is flexible and is not to be applied formulaically. That is, "no one element should become a prerequisite to imposition of alter-ego status; rather, all the relevant factors must be considered together." *Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Dorn Sprinkler Co.*, 669 F.3d 790, 794 (6th Cir. 2012) (internal quotation and citation omitted).

The Board did not have substantial evidence to support its finding that Remco is an alter ego of Collective and RDM. Instead, the ALJ's decision, which the Board affirmed without any analysis, focused primarily on the heavily intertwined relationship between Collective and RDM, and not between Remco and Collective or Remco and RDM. The ALJ improperly extended his findings about Collective and RDM to Remco, an entirely separate, distinct and legitimate operation, without a sufficient factual basis upon which to do so. While Collective and RDM may be alter egos of one another, Remco is a separate, properly formed non-union company and is an alter ego of neither. Accordingly, the Board's wholesale adoption of the ALJ's determination is patently unsupported by the evidence.

II. The Board Failed to Consider the Equities When Determining That Remco Is an Alter Ego of Collective and/or RDM

The ALJ and the Board erred by automatically applying the alter ego doctrine to Remco, without any consideration of the equities. District Courts in this

Circuit have held that the alter ego doctrine is not to be automatically applied, but is to be used only when necessary to prevent an inequity. See *Flynn v. Interior Finishes, Inc.*, 425 F. Supp. 2d 38, 52 (D.D.C. 2006); *Boland v. Thermal Specialties, Inc.*, 950 F. Supp. 2d 146, 153 (D.D.C. 2013).[2] The D.C. Circuit has not yet adopted or rejected the holdings of the district courts in *Interior Finishes* and Boland; thus, this case presents an important matter of first impression in this Circuit.

This Court should adopt the reasoning of the district courts in *Flynn* and *Boland*, which held that the alter ego doctrine is not to be automatically applied merely because the relationship between or among entities is characterized by a sufficient number of the alter ego doctrine's criteria. *See Boland*, 950 F. Supp. 2d at 153 (even where many alter ego factors were present, "that tally alone cannot carry the day."); *Interior Finishes*, 425 F. Supp. 2d at 53-54. Instead, relying on precedent from other Circuit Courts, as well as this Court's opinion in *Flynn v.*

[2] While these cases applied the alter ego doctrine in the context of ERISA violations, the same analysis is employed both in the labor context and the ERISA context. *See Island Architectural Woodwork, Inc. v. N.L.R.B.*, 892 F.3d 362, 371 (D.C. Cir. 2018) (setting forth law of the D.C. Circuit with respect to alter ego liability and citing to cases involving both ERISA and labor violations) (citing *Flynn v. R.C. Tile*, 353 F.3d 953 (D.C. Cir. 2004) (ERISA case) and *Fugazy Cont'l Corp. v. N.L.R.B.*, 725 F.2d 1416 (D.C. Cir. 1984) (labor case)); *see also Boland*, 950 F. Supp. 2d at 152 (relying on decisions on appeals from Board decisions to describe and set forth alter ego doctrine in ERISA case, and explaining that the same alter ego doctrine is used to prevent evasions of both union and ERISA obligations).

R.C. Tile, the district court has held that the following factors must be considered before the alter ego doctrine can be imposed: (1) whether the relationship between the companies has caused the union to receive less than that for which it bargained under a collective bargaining agreement and (2) whether the union was deceived about the relationship between the companies. *Interior Finishes*, 425 F. Supp. 2d at 52-53. In the absence of these circumstances, the alter ego doctrine should not be imposed.

The Board failed to consider whether application of the equitable alter ego doctrine was necessary or even appropriate under the particular facts of this case. Instead, the Board conclusorily approved of the ALJ's decision to automatically apply the doctrine based solely on its (erroneous) conclusion that a sufficient number of alter ego factors were present. However, under the particular facts of this case, application of the alter ego doctrine was not proper as a matter of equity, even if Remco's relationship with Collective and/or RDM were characterized by a sufficient number of alter ego factors, because the Union was not harmed by the formation and operation of Remco, nor was it deceived about the relationship among Remco, Collective and RDM.

STANDING

Petitioners have standing to seek review in this Court as aggrieved parties to a final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Union v. N.L.R.B.*, 348 F.2d 369, 370 (D.C. Cir. 1965).

ARGUMENT

I. STANDARD OF REVIEW

While courts generally afford deference to Board determinations on appeal, the standard of review of Board orders in unfair labor practice cases is "not so deferential that the court will merely act as a rubber stamp for the Board's conclusions." *Fred Meyer Stores, Inc. v. N.L.R.B.*, 865 F.3d 630, 636 (D.C. Cir. 2017). Instead, a court will overturn the Board's decision if the Board "relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so." *E.I. Du Pont De Nemours & Co. v. N.L.R.B.*, 682 F.3d 65, 67 (D.C. Cir. 2012). *See also Hawaiian Dredging Constr. Co., Inc. v. N.L.R.B.*, 857 F.3d 877, 885 (D.C. Cir. 2017); *Jochims v. N.L.R.B.*, 480 F.3d 1161, 1167 (D.C. Cir. 2007); 29 U.S.C. § 160(f).

Here, the Board relied upon the ALJ's findings in determining that Remco is an alter ego of Collective and RDM. However, the ALJ's findings, and thus the Board's adoption thereof, are not supported by substantial evidence. Moreover, the

ALJ failed to consider whether application of the alter ego doctrine is warranted as a matter of equity under the particular circumstances of this case. By simply rubber-stamping the ALJ's decision, the Board acted arbitrarily and capriciously.

Accordingly, the Court should overturn the Board's Order and Decision to the extent it forces Remco to abide by and honor Collective and RDM's CBAs.

II. THE BOARD'S ORDER REQUIRING THAT REMCO BE SUBJECT TO THE BARGAINING OBLIGATIONS OF COLLECTIVE AND RDM AND TO THE CONTINUING APPLICATION OF THE CBAS BINDING COLLECTIVE AND RDM MUST BE OVERTURNED

A. The ALJ's Finding That Remco Is an Alter Ego of Collective and RDM, and the Board's Adoption of that Finding, Is Patently Insupportable by the Evidence

The law clearly permits a construction firm to create two separate and distinct entities: one that is a party to a collective bargaining agreement with a union, and one that is not. *See C.E.K. Indus. Mech. Contractors, Inc. v. N.L.R.B.*, 921 F.2d 350, 352 at n.3 (1st Cir. 1990); *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275 (9th Cir. 1984). This economically advantageous business arrangement, commonly known as a "double breasted operation" or a "dual shop," allows an enterprise to compete for and bid on both union and non-union work, so that both companies can "bid more competitively in their respective markets." *C.E.K.*, 921 F.2d at 352 at n.3; *Carpenters' Local*, 743 F.2d at 1275. When a double-breasted operation is properly used in furtherance of this legitimate

business purpose, the law respects the distinctness of each entity and therefore will not bind the separate non-union entity to the CBA governing its union counterpart.

On the other hand, where formation of a separate non-union entity is merely a sham transaction or a technical change in operation that was in truth designed to escape the unionized company's collective bargaining obligations, courts will invoke the "alter ego" doctrine, if appropriate under the circumstances, and treat the two separate companies as one employer for purposes of collective bargaining obligations. *See Island Architectural Woodwork, Inc. v. N.L.R.B.*, 892 F.3d 362, 371 (D.C. Cir. 2018); *Fugazy Cont'l Corp. v. N.L.R.B.*, 725 F.2d 1416, 1419 (D.C. Cir. 1984). As such, under the right circumstances, the alter ego doctrine may provide an analytical hook to bind an entity to the terms and conditions of a collective bargaining agreement of which it is not a signatory.

The question of alter ego liability can arise in two scenarios: an entity may completely shut down and be replaced by a non-union entity, or an entity may continue to operate but "spin[] off a portion of its unionized operations to a non-union entity." *Island Architectural*, 892 F.3d at 371. In the latter circumstance, a double-breasted operation may become illegal if the companies are, in fact, alter egos of one another. In determining whether to impose alter ego liability in either scenario and bind an employer to the contractual or statutory obligations of a nominally separate employer, the Board must consider various factors, "including

'substantial identity of management, business purpose, operation, equipment, customers, supervision, and ownership' between the two entities.'" *Id.* at 370 (quoting *Fugazy*, 725 F.2d at 1419). The Board also gives substantial weight to evidence of a company's motive to evade its union obligations. *Id*. Significantly, however, "no single factor is dispositive, and not every factor need be present in a particular case to establish alter ego status." *Id*. at 370-71.

Here, Remco is neither a sham company nor a disguised continuance of either RDM or Collective. Remco is entirely separate and distinct from RDM, and is part of a lawful dual shop enterprise with Collective. The ALJ appears to have conflated Remco with Collective and RDM for purposes of its alter ego analysis. That is, the ALJ began its analysis by detailing the many factors indicating an alter ego relationship between Collective and RDM. Indeed, much of the evidence put forth during the hearing focused on the closely intertwined relationship between Collective and RDM. Specifically, the ALJ found, *inter alia*, that: Collective and RDM used the same address and the same fax and telephone numbers; Collective performed work for RDM for which Collective was not always paid; there were significant financial dealings between the two companies, such as loans that were not made at arm's length; Mark was designated as vice president of Collective in a corporate document; Mark dealt with the Union on behalf of Collective as well as RDM; and Desiree was the office manager of both companies. (JA635-636).

However, the same quantity and quality of evidence did not exist with respect to Remco and Collective or Remco and RDM. Remco did not share an office address with Collective or RDM. Neither Mark nor Desiree had any involvement in Remco's operations. There was no evidence of financial dealings between Remco and Collective or Remco and RDM. Thus, the relationship between Remco and Collective/RDM lacks many of the significant facts that this Court has found to be indicative of an alter ego relationship.

For example, in *Island Architectural*, the two entities had a substantially identical business purpose and collaborated extensively on their operations. 892 F.3d at 372. Further, the two companies performed worked "for the same customer with the same equipment in the same place in the same way with many of the same employees and managers." *Id*. The non-union spin-off operated in the back of the union entity's building for free, and received "significant operational assistance" from the union company without any documentation or demand for repayment by the union company. *Id*. at 373. Moreover, the owner of the companies "repeatedly misled the Union" about the relationship between the companies, and the non-union company was formed to circumvent the union company's obligations under the Act. *Id*. at 374.

The facts relied upon by the ALJ and the Board in finding Remco an alter ego of Collective and RDM are a far cry from those found in cases like *Island*

Architectural. Specifically, the ALJ and the Board relied entirely on the following facts:

- Remco and Collective are both owned and managed by Ryan;
- Ryan formed Remco to perform non-union work.
- Remco, Collective and RDM engage in the same general field of business (i.e., concrete and masonry);
- Remco uses some of the same suppliers as Collective and RDM;
- Remco uses the same "type of equipment" as Collective and RDM;
- Some former RDM employees eventually worked for Remco;
- A contractor once asked Ryan to obtain information from his father regarding RDM;
- Ryan once referred to his collective experience in the concrete industry in introducing Remco to a potential customer; and
- Remco uses the same insurance company as Collective and RDM.

(JA635-636). Considered in context with the record as a whole, these facts are innocuous and do not support a finding that Remco is an alter ego of Collective or RDM. Instead, the above facts are merely indicative of Ryan's years of experience in the concrete and masonry business, his familial (father-son) relationship with the owner of RDM, and Collective and Remco's lawful dual shop arrangement. Each fact will be addressed in turn below.

Ryan's Ownership and Management of Both Collective and Remco. The fact that Ryan owns and manages both Collective and Remco does not support a

finding of alter ego liability when viewed in context with the rest of the evidence. When Collective's union work began to dry up, causing financial hardship for Collective, Ryan chose not to shut down Collective, but instead to create a dual shop enterprise, with Collective as the union arm and Remco as the non-union arm.

Ryan's Motivation for Forming Remco. Ryan did not close Collective's doors because he hoped to continue in union work once market forces permitted. (JA170). Thus, contrary to the ALJ's findings, Remco was not formed to avoid Collective's or RDM's union obligations. Indeed, there is sufficient evidence demonstrating that as a result of debts, liens, and other financial difficulties experienced by both Collective and RDM, neither company had sufficient capital to perform projects because they could not even afford to pay its workers. (JA85) (Mark Ciullo explaining that Collective could no longer pay its staff due to its enormous debt); (JA1002-104) (Mark Ciullo explaining that once it went union, RDM could no longer get work from its regular customers because of the cost burdens of hiring union); (JA132) (Mark Ciullo stating that while he has been trying to get jobs for RDM, it is hard to get bids and perform work "without any money"). In light of the above, the fact that Remco and Collective have common ownership and management does not weigh in favor of alter ego liability.

Remco, Collective and RDM Perform the Same Kind of Work, Use Some of the Same Suppliers and the Same Type of Equipment. The fact that Remco,

Collective and RDM are all in the concrete and masonry business does not weigh in favor of imposing alter ego status on Remco. Ryan grew up working in the concrete and masonry business, and that is effectively all he knows. (JA156). After working for his father's concrete and masonry company, he formed his own concrete company, Collective, in which his father had no ownership interest whatsoever. (JA157). Moreover, the fact that Remco uses the same suppliers and *type of* equipment as Collective and RDM does not provide support for imposing alter ego liability. Ryan testified that there are only a "handful" of companies in New Jersey that provide the specialty materials and equipment involved in the concrete and masonry business. (JA134). Indeed, Ryan testified that most concrete and masonry contractors in the area use the same suppliers, making it difficult to obtain certain materials at times. (*Id*.). Moreover, using the same *type of* equipment is drastically different than using the same equipment, as did the companies in *Island Architectural*.

Some former RDM employees eventually worked for Remco. As for the fact that a few former RDM employees eventually worked for Remco, those employees had already voluntarily separated from RDM *before* Remco was even formed. (JA55-56). Ryan reached out to some of these employees after forming Remco simply because he was familiar with them after having worked with them during his time at RDM. *Id*. The fact that a few former RDM employees eventually

worked for Remco does not suggest an alter ego relationship, especially in light of the absence of other facts supporting alter ego status. *See Rd. Sprinkler*, 669 F.3d at 795 (fact that employees of union company worked for non-union company did not weigh in favor of finding the two companies alter egos of one another).

A Contractor Once Asked Ryan to Obtain Information From his Father Regarding RDM. The fact that, while Ryan was working for Remco, a contractor asked Ryan about a job release for work performed by RDM, does not lend any support to an alter ego relationship between Remco and RDM. While Ryan is the owner of Remco, he is also Mark's son. It is entirely reasonable for a contractor to obtain information regarding RDM through Ryan, the son of RDM's owner, without it meaning that Remco and RDM are in reality one company. At most, this fact is indicative only of the close familial relationship between the owner of RDM and the owner of Remco, which is not sufficient to confer alter ego status on Remco as a matter of law. *See Rd. Sprinkler*, 669 F.3d at 794-95 (fact that union company was owned by father and non-union company was owned by son did not weigh in favor of alter ego status).

Ryan Once Referred to His Collective Experience In the Concrete Industry In Introducing Remco to a Potential Customer. The ALJ's reliance on Ryan's isolated statement to a potential customer that he has extensive experience in concrete industry also does not support an alter ego finding. Ryan worked with his

father in the concrete industry beginning at a very young age, and remained in the business for the rest of his life. To represent this collective experience to a potential customer cannot possibly be evidence that Remco is an alter ego of Collective and RDM.

Remco Uses the Same Insurance Company As Collective and RDM. As mentioned above, Remco and Collective have common ownership, and RDM is owned by Ryan's father. It is therefore not unusual that the companies would engage the same insurance carrier as a matter of familiarity and/or satisfaction with that carrier. But using the same insurance company does not in any way prove or even suggest that the three separate companies are in fact one single enterprise for purposes of being bound to a union contract. Such a result would be preposterous and inconsistent with the spirit and purpose of the alter ego doctrine.

The above facts, especially when considered in the context of all the record evidence, fall well short of what is typical in cases imposing alter ego liability in this Circuit, such as *Island Architectural*. While Collective and RDM may be alter egos of one another, Remco cannot simply be lumped in with those companies. Remco's relationship with Collective and RDM, when analyzed separately from Collective and RDM's relationship with each other, lacks any significant indicia of an alter ego relationship. As such, Remco should not be held to the union obligations of Collective and RDM.

B. The ALJ and the Board Should Have Considered the Equities Before Imposing the Alter Ego Doctrine Upon Remco

The ALJ and the Board indiscriminately applied the alter ego doctrine to Remco based solely on its (erroneous) conclusion that a sufficient number of alter ego factors were present. Imposition of the alter ego doctrine to Remco was entirely improper because no inequity would result by allowing Remco to remain a non-union company, even if there were sufficient indicia of alter ego status. To the contrary, great inequity would result from forcing Remco to be bound by Collective and RDM's union obligations. As a matter of first impression, this Court should adopt the rule set forth by the District Court in *Interior Finishes* and *Boland* that the alter ego doctrine should only be applied where inequity would result by treating the subject entities as separate and distinct, even if the relationship between or among entities is characterized by a sufficient number of the alter ego doctrine's criteria. *Boland*, 950 F.Supp.2d at 153; *Interior Finishes*, 425 F. Supp. 2d at 52.

In *Interior Finishes*, the defendants, Interior Finishes, Inc. and R.H.I., Inc., were both solely owned by Dale R. Stevens and were part of a double-breasted operation. R.H.I. was established first and operated as a general contractor on non-union projects involving the sale and installation of flooring. *Id*. at 40-41. In response to demand among customers for union labor, Stevens formed a separate corporation, Interior Finishes, to install and supply flooring with an all-union work

force, and entered into a number of CBAs with various unions. *Id*. at 41-42. All projects performed by Interior Finishes were for a single customer, the May Company. *Id*. at 54. However, May Company eventually selected other union contractors to perform its projects. *Id*.

After performing an audit of Interior Finishes' contributions under the CBAs, the Trustees of a multiemployer employee benefit plan brought an action alleging, *inter alia*, that R.H.I. is an alter ego of Interior Finishes and was therefore required to make contributions to the pension fund pursuant to the CBAs signed by Interior Finishes, even though R.H.I. was not a party to those contracts. *Id*. at 43. The defendants countered that R.H.I. should not be held liable as Interior Finishes' alter ego because application of the doctrine under the facts of the case would be a misuse of the doctrine. *See id*. at 43, 52.

The defendants argued that even where the characteristics of an alter ego relationship are present, the alter ego doctrine should not be invoked unless necessary to prevent some inequity. In considering this argument, the court relied on two cases, one from the First Circuit and one from the Sixth Circuit, both of which held that, irrespective of whether its factors are met, the alter ego doctrine should be invoked only where inequity would otherwise result. *Id*. (citing *Mass. Carpenters Cent. Collection Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18 (1st Cir. 2003); *Trs. of the Resilient Floor Decorators Ins. Fund v. A & M Installations,*

Inc., 395 F.3d 244 (6th Cir. 2005)). In those cases, the court found that imposition of the alter ego doctrine was not warranted because there was no indication that the union was somehow worse off as a result of the formation of a non-union counterpart or some other change in structure of the unionized company. *Id*. at 52-54. Moreover, there was no evidence that the owners of the companies deceived the union about the relationship between the two companies. *Id*. at 52-54.

The district court adopted the reasoning of the First and Sixth Circuits and held that the alter ego doctrine should not be invoked unless necessary to prevent some inequity, which is determined by analyzing whether the union was somehow worse off as a result of the formation of the non-union company, and whether the union was deceived as to the relationship between the companies. Significantly, in doing so, the court rejected the Trustees' argument that such an approach would be in contravention of D.C. Circuit precedent holding that anti-union animus is not required for alter ego liability. *Id*. at 53. While the court agreed with the Trustees that in the D.C. Circuit, a finding of anti-union animus or wrongful motive is not required before a court can apply the alter ego doctrine, it held that the equitable approach to the alter ego doctrine is fully compatible with D.C. Circuit precedent and similar precedent by other Circuits. *Id*. at 54. Indeed, as the court explained, prior to the decisions in *A.A. Building* and *A & M Installations*, both the First and Sixth Circuits had definitively held, like the D.C. Circuit, that anti-union animus or

wrongful motive is not a prerequisite for imposing the alter ego doctrine. Neither *A.A. Building* or *A & M Installations* overruled those prior decisions, but they still found an alter ego finding was unwarranted because the unions were no worse off and were not deceived. Thus, the court in *Interior Finishes* held that its ruling was entirely consistent with, and did not offend, prior D.C. Circuit precedent.

Applying this equitable analysis, the court ultimately held that treating R.H.I as an alter ego of Interior Finishes would be inappropriate and inequitable under the facts of the case. Central to the court's conclusion was the fact that the union did not receive less than it was due when R.H.I. began performing the work formerly performed by Interior Finishes. The court explained that, contrary to the Trustees' assertion, after Interior Finishes lost the May Company as its primary customer, R.H.I. did not continue to perform those projects on a non-union basis with former employees of Interior Finishes. *Id*. at 54. Instead, the May Company had selected completely different union contractors to perform its projects. Moreover, any Interior Finishes employees that may have been employed by R.H.I. did not work on any of Interior Finishes' former projects. *Id*. at n.17. As such, the court explained, the Fund continued receiving contributions for the same work previously performed by Interior Finishes, only at that point, the contributions were coming from different subcontractors that received the bids from the May Company. *Id*. at 54-55.

The court also highlighted the fact that Interior Finishes continued to advertise and submit bids for business after losing its sole customer. According to the court, this is "uncharacteristic of a business entity that has closed its doors in order to avoid union responsibilities." *Id*. at 54.

Finally, Interior Finishes never deceived the union about its structure, ownership, relationship with R.H.I., or the fact that R.H.I. regularly subcontracted with non-unionized installers. *Id*. at 56. Because the Court found the circumstances of the case to be unsuitable to the alter ego doctrine as a threshold matter, the Court did not even engage in an analysis of the alter ego factors.

As a matter of first impression, this Court should adopt the reasoning of the district court in *Interior Finishes* and hold that unless a double-breasted operation results in some type of injustice to the union, courts should not impose the collective bargaining obligations of the union entity upon the related non-union entity through the alter ego doctrine.

C. There Is no Equitable Basis Upon Which to Treat Remco As an Alter Ego of Collective or RDM

Even if the relationships between Remco and Collective or Remco and RDM were characterized by sufficient indicia of the alter ego test, (which Remco and Collective strongly contend they are not), Remco should not be required to recognize and bargain with the Union or be bound to the CBAs of Collective and RDM. As set forth by *Interior Finishes*, before deciding whether an entity should

be treated as an alter ego of another, the Board should consider whether the Union was any worse off as a result of the formation and existence of Remco than it otherwise would have been, and whether the Union was deceived as to the relationship between the companies.

Here, the record evidence establishes that neither of these circumstances are present. As such, Remco should not be treated as an alter ego of Collective or RDM and should not be required to abide by their CBAs or bargain with the Union.

1. The Union Was Not Harmed In Any Way As a Result of the Formation of Remco

The record evidence demonstrates that the formation of Remco did not result in the Union losing any contributions or other benefits it would have otherwise received under its CBAs with Collective and RDM. In fact, even absent the formation of Remco, the Union would have suffered the same losses as a result of the financial hardship experienced by Collective and RDM.

As a result of debts, liens, and other financial difficulties experienced by both Collective and RDM, neither company had sufficient capital to perform projects because they could not even afford to pay its workers. (JA85) (Mark Ciullo explaining that Collective could no longer pay its staff due to its enormous debt); (JA102-104) (Mark Ciullo explaining that once it went union, RDM could no longer get work from its regular customers because of the cost burdens of hiring

union); (JA132) (Mark Ciullo stating that while he has been trying to get jobs for RDM, it is hard to get bids and perform work "without any money").

Indeed, the testimony of both Ryan and Mark demonstrates that, had they been financially able to perform union work, they would have. When asked whether he planned to restore Collective's operations after paying off its massive debts, Ryan Ciullo stated:

> ***I mean I don't have anything against union work***. If I can make money I mean I – that's the reason that, you know, we made a go of it for 16-17 years. As long as the marketplace would support it, I would – you know, I wouldn't – I don't have a problem with it.

(JA170) (emphasis added). Ryan further explained that many large project owners had been gravitating toward non-union contractors "since the economic downturn of 2007-2008" and, therefore, there was simply not much business to be had by union shops like Collective. (JA171). Similarly, Mark testified that RDM is still in existence, and that he would like to continue bidding work for RDM once its financial situation improves. (JA132). This testimony demonstrates that had Collective and/or RDM been able to survive financially, they would have been happy to perform union work. Thus, any negative impact to the Union resulted solely from the financial hardship of the signatory companies, not the formation of a non-union shop.

Moreover, the formation of Remco did not cause Collective and RDM's union workers to begin performing non-union work, because any former Collective

or RDM employees that Remco may have hired had already left RDM well before the formation of Remco. Ryan testified that while the Union organized many of RDM's employees, "some of them weren't interested in joining the Union and then I guess they worked for other companies and when I formed Remco I reached out to them." (JA55-56). Mark corroborated this testimony by explaining that "a handful" of RDM employees did not want to join the Union, and therefore they were let go. (JA118). Significantly, this occurred before the formation of Remco, while Ryan was still working for RDM. (JA118, 172-173, 182). Thus, as in *Interior Finishes*, Remco did not poach any of RDM's Union employees away from performing union work. Thus, the formation of Remco did not result in Union employees performing non-union work to the detriment of the Union's rights under the CBAs.

2. The Union Was Never Deceived Regarding the Relationship Among Remco, Collective and RDM or About Remco's Non-Union Status

Sammy Espinoza, a representative of the Union, testified that when he first went to one of Remco's jobsites and met with Ryan, Ryan gave a candid account of Remco's ties to Collective and RDM and its desire not to perform union work. According to Mr. Espinoza, Ryan explained that:

> REMCO is his company. How REMCO is not going to sign no agreement to no unions. ***How the unions forced his father into signing an agreement. How Collective is gone, because of the***

> ***unions***. I basically responded by saying the unions didn't force anybody to do anything. And he just kept venting after that. . .

(JA138) (emphasis added). Not even the Union's own representatives claimed to have been deceived in any way nor kept in the dark about Ryan's ownership of Remco, Remco's relationship to Collective and RDM, and Ryan's desire to maintain Remco's non-union status. As in *Interior Finishes*, the Union was fully apprised and aware of Remco's structure, ownership, and relationship with Collective and RDM, and the fact that it performed non-union work. *See Interior Finishes*, 425 F. Supp. 2d at 52, 56. Under such circumstances, imposition of the alter ego doctrine is unwarranted, and Remco should not be bound by the collective bargaining obligations of Collective or RDM.

CONCLUSION

For each of the reasons set forth above, Collective and Remco's Petition should be granted, and the Board's Order requiring Remco to recognize and bargain with the Union and to apply the terms and conditions of the CBAs governing Collective and RDM should be denied enforcement. Collective and Remco further request that they be awarded their costs and any other relief, legal or equitable, to which they are entitled.

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Respectfully submitted,

/s/ Paul Kennedy

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,800 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 210 in Times New Roman Font 14.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2018, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

Respectfully submitted,

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